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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 118

CHAIN O'MINES, INCORPORATED,
A CORPORATION, ET AL.,

Petitioners,

vs.

UNITED GILPIN CORPORATION, A CORPORATION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**REPLY OF
PETITIONERS FOR WRIT OF CERTIORARI TO
ANSWER OF RESPONDENTS THERETO.**

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*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

In presenting the petitioners' petition for a writ of
certiorari herein, we were, of course, aware of the fact that

where the appellate tribunal has reversed the trial court, especially when the record is voluminous, as in this case, and facts as well as law are interwoven and involved, the laboring oars are in the hands of petitioners.

The rules of this court, however, rigidly limit contents and scope of petition and brief supporting same, hence the brevity of statement of the case and argument contained in our brief—a total of 35 pages.

Respondents have seen fit to file an elaborate answer and brief to our petition and brief—embracing 47 pages, and we now feel free to make a short reply to the substance thereof.

In their answer to our petition, respondents concede the jurisdiction of the court to *entertain* the petition in this case, but contend that such jurisdiction should not be exercised here.

We meet the issue raised and hasten to emphatically assert that petitioners are not seeking “another hearing” as claimed by respondents, allegedly supported by a decision of this court denying certain motions for suspension of mandate of an Appeals Court, not at all in point. With respect to other citations of authorities as to why the court should not *exercise* its jurisdiction and grant the petition for certiorari, none are controlling and we shall content ourselves by observing that the court itself is peculiarly familiar with its discretionary powers and decisions rendered in that behalf and will take judicial notice thereof.

The petition for a writ of certiorari in this case must stand or fall upon the principles of the rights or wrongs involved and will be measured by the standard of justice applicable.

Petitioners firmly urge that the *strange*, confusing, incomprehensible, unintelligible and inexplicable opinion and

decision of the Circuit Court of Appeals for the Seventh Circuit is inequitable, unconscionable and erroneous and must be reviewed in the interest of public morality and justice.

We at this point again invite the Court's perusal of the Chancellor's oral decision from the bench following the hearing and while he had all of the facts adduced at the trial freshly in mind, together with the findings of fact, conclusions of law and decree subsequently entered, including the terms of the vital and all important contract of June 19, 1934, entered into between the parties, and as well to a close scrutiny of the opinion of the Appeals Court, in order that this Court may have a clear understanding of the facts involved.

With this end in view, petitioners strongly contend that the Appeals Court misconceived and misinterpreted the findings of fact, conclusions of law and decree of the District Court, misapprehended general and local law applicable, misconstrued the plain terms, language and intent of the contract, injected wholly new and foreign elements therein and finally disposed of this solemn agreement between the parties involving an executed undertaking providing a \$1,500,000 consideration by treating it as a "scrap of paper."

What were the facts that under the guidance of the trusted Director, Kremm, finally culminated in the contract of June 19, 1934? On May 22, 1934, under a judgment in a mechanics lien labor and power suit, a judicial sale was effected relative to the property herein and sheriff's certificate of sale issued to the two lienors therein. The total amount involved aggregated a little over \$97,000. All other creditors of Chain O'Mines, including holders of bonds under a \$300,000 bond issue, secured by deed of trust on the property, became subordinated to this judg-

ment and sale and could protect themselves only by means of becoming judgment creditors and redeem in the usual way. The redemption period for Chain O'Mines under the laws of Colorado would expire on November 22, 1934. And thereupon, Director Kremm, who had been re-elected to the Board on May 8, 1934, in an alleged endeavor to assist the corporation in solving its financial difficulties, having procured options and terms for the purchase by himself of the sheriff's certificate, negotiated the agreement which provided a sale to L. M. Seeley, associate and agent of Kremm and Charles L. Schwerin, of the equity of redemption of Chain O'Mines, Incorporated, in and to the properties affected, for a stated consideration of \$1,500,000 over and above the face of the certificate of sale. The directors and stockholders of Chain O'Mines thereby felt themselves relieved of further worry and responsibility with respect to the sale or redemption therefrom, although more than five months of the redemption period still remained unexpired.

At page 26 of our petition, we quote part of opinion of the Appeals Court, indicative of that Court's disregard and contempt for the contract of June 19. Here we shall supplement same by a further brief quotation from paragraph (4) p. 622, 109 Fed. Rep. as follows:

"Little may be gained by reciting in detail all the evidence upon which we predicate our conclusion that the evidence does not establish fraud. Suffice it to say that when these defendants came into the picture, the plaintiff, Chain O'Mines, was about to sink—unable to raise the money necessary to satisfy liens which were about to result in the sale of the property."

And in the next paragraph (4):

* * * "The enforcement of these liens had proceeded so far as to result in a public sale and the issuance of a sheriff's certificate."

And again in the following paragraph (4):

• • • "Had Kremm not negotiated the contract for the sale of lienor's interest, and secured the down payment of \$5,000 from his associate, Schwerin, an officer of BeeDee Management Company, it is reasonably clear that plaintiff would have failed to raise the necessary funds, and then and there would have lost the property." • • •

Now, in the light of the contract of June 19, the all in all in this law suit, the language above quoted just does not make any sense at all. Nor does any of the language of the opinion, to our minds, in view of the record, make any sense.

We respectfully concede that the record discloses that the stockholders had been shown to be extremely reluctant, if not absolutely unwilling or unable to make further investments, but that did not justify the statements that "Chain O'Mines was about to sink" or that it "would have failed to raise the necessary funds, and then and there would have lost the property." It will be remembered that on June 19, the date of the contract, five months and three days of the statutory redemption period still remained. These assumptions and statements of the Appeals Court, are, we submit unfounded and unjustifiable speculations and such as no member of any court sitting at *nisi prius* would permit any witness to indulge. What would or might have happened in those five months it is obviously impossible for any man to say. What did happen is absolutely certain. The directors and stockholders were not only interested in liquidating the labor and power lien; that was a comparatively small item. They were vitally interested in the some \$1,800,000 stock investments of more than 1100 stockholders, and the payment of debts to their other credi-

tors. However, when defendants agreed to pay off the lien claims and give a mortgage for \$1,500,000 for Chain O'Mines' equity, the directors and stockholders accepted the contract offered by their trusted fellow director, Kremm, in good faith, and were lulled into the belief that further efforts to raise money or to redeem was not only unnecessary, but contractually improper.

But if, for the sake of argument, it be admitted that the plight of Chain O'Mines was as desperate as the opinion states, does that justify "scrapping" the contract? May it be said that one can be legitimately defrauded of his property because there is reason to believe that he is about to lose it to another and that human society is like a pack of wolves where one in distress may be devoured by his fellows?

An analogy to this line of reasoning may be cited. Recent events in world affairs have shown that certain weak and defenceless sovereign nations were relying upon solemn contracts, designated treaties, for their protection against assaults and invasions, when suddenly, on the pretense that a certain Democratic Power was about to violate the integrity of such nations, a would be World Dictator promptly "scrapped" and ignored his contractual obligations, ruthlessly applied the law of the jungle, invaded, took over, slaughtered and enslaved the free peoples of those trusting nations and confiscated their belongings.

In another part of the Appeal Court's opinion, on p. 623, discussing the benevolent course of defendants toward plaintiffs in connection with alleged facts and acts, which were wholly non-existent and not based upon anything contained in the record, it is said: * * * "Such efforts, though futile, do not evidence fraud as much as they do good faith."

Good faith, honesty of purpose and a protectorate for their own good was claimed by the actor to the drama above referred to. The results in both cases were similar. By the judgment of the Appeals Court, vetoing and nullifying the trial Chancellor's judgment, sanction was given to the appropriation and confiscation of Chain O'Mines and its stockholders properties by the despoilers, Kremm, Schwerin and Seeley without compensation. By the law of might, the weak and trusting peoples of the small democracies had their properties confiscated and appropriated, and, moreover, will lose their liberties unless a reversal of the Dictator's "good faith" exploits is affected.

Now, the vital issue involved here is this: Was the Chancellor right in his findings, conclusions and judgment or was he wrong.

We confess great reverence for the beneficence of equity jurisprudence. As is well known, it arose and developed with the dawn of civilization in England. Its origin rested upon religious precepts and was based upon the assumption that the King ruled his people by Divine Providence and could do no wrong; hence any citizen who fancied himself wronged and was without remedy under the rigid rules of the common law, could petition his King for redress. An accumulation of such petitions gave rise to the creation and establishment of the High Court of Chancery and the King's Chancellor became the keeper of the "King's Conscience" for the righting of all wrongs not cognizable under the common law. Our equity jurisprudence is inherited from the English system and our Chancellors' Consciences substituted. A solemn responsibility thus devolves upon our Chancellors, and their findings, decisions and judgments are not lightly vetoed. Rule 52 of the Rules of Civil Procedure promulgated by the Supreme Court of

the United States recognizes the sacredness of Chancellors' judgments in the following language:

* * * "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses." * * *

The substance of the above rule is incorporated in the legal set up and recognized by the courts of last resort in every state in the union.

And there is a fundamental and substantial reason for the application of the rule aside from the solemn import attaching to the motivating operation of the Chancellor's Conscience to observe the Divine Law and declare and decree truth, right and justice. It is this: Time is a healer of wounds; it also absorbs shocks and modifies opinions and judgments. It is difficult, historically, for the present generation to conceive the impressions stamped upon the minds and consciences of the eyewitnesses to the Supreme Tragedy enacted on Calvary. But to mention a very recent instance: The impression upon the minds and consciousness of eyewitnesses to the ravages of Poland will be tempered, shaded and shrouded in mists to the perceptions of the contemporary and future students of history as to these events and may be recorded and in cold type accepted as valiant exploits of a heroic conqueror bent upon the establishment of a new and better order of human life and society, rather than the ready acceptance of the stern truth of an unprovoked attack and the indiscriminate wholesale murders of innocent humans by an insane, evil, power loving assassin who long since should have been isolated, quarantined and eliminated.

And so, the Chancellor who saw, heard and observed the witnesses in this case—the principals and active factors

to the controversy—received and scanned all of the evidence introduced, motivated by his conscience and the firm resolve: “I will betroth Thee unto me forever, in righteousness, and in judgment,” and guided by the application of his mental, intellectual and rational reasoning faculties, was peculiarly able to judge the rights and the wrongs and establish and declare the truth and thus render righteous judgment.

The extended alleged statement of the case and summary of facts contained in brief and argument of respondents, embracing some 25 printed pages thereof, presumably intended to bolster up the opinion of the Appeals Court, should convince this court of the necessity of granting the writ of certiorari and thus affording a review of the case.

But this so-called statement and summary is so wholly inaccurate, irrelevant, argumentative, confusing and self-serving that we shall make no further comment thereon, except to observe that in our petition for writ of certiorari we submitted a “statement of the case” citing briefly ample evidentiary facts in support of findings and decree of the Chancellor.

On page 38 of answer, designated reply to argument, it is stated:

“* * * The parties never went through with the contract. The Chain O’Mines abandoned the contract and gave it up for lost in 1934.”

These assertions and the entire paragraph of which they are the concluding part are altogether untrue and are not based upon any evidence in the record whatsoever.

And again, on page 40 it is said:

“(c) Petitioners err when they state that the mining operations were profitable.” * * *

Of course, there is no evidence supporting that assumption. In our petition for the writ we submitted respondents' own figures of yearly profit from their operations, carried forward to "earned surplus" taken from their Registration Statement filed with Security and Exchange Commission, in evidence.

On page 43 the following amazing statement appears:

"The Chain O'Mines lost its property because it was financially destroyed, prior to the entry of the respondents into the operations." * * *

This again is utterly false and unsupported by any evidence to be found in the record.

The truth was and is, as will be fully demonstrated to the court on review, that as the President of the United States by authority of the Congress advanced and pegged the price of gold, from time to time, so the reservoir of tens of millions of tons of proven low grade ore, mined by the glory-hole method, with the complete 2,000 ton a day milling capacity equipment of Chain O'Mines became more and more valuable.

Wishful thinking, erroneous assumptions, naked, untrue assertions and a jumble of words, words and more words, based thereon, unsupported by factual evidence, may temporarily cause "confusion worse confounded" but will ultimately be pierced by the light of truth to the end that right may prevail and justice triumph.

At page 37 of respondents' answer it is sought to give definitions of the words "float," "temporary phase" and "refinancing project" employed by the Appeals Court. We submit that this court is thoroughly familiar with the meaning of these words and phrases and their true definitions. However, Cyclopedic Law Dictionary, at page 417, defines a floating security as follows:

"FLOATING SECURITY. A floating security is 'a security on the property of the company as a going concern, subject to the powers of the directors to dispose of the property of the company while carrying on its business in the ordinary course.' 1 Ch. 434, 10 Ch. D. 530."

"Debentures which allow a company to deal with its assets in the ordinary course of business until the company is wound up or stops business or a receiver is appointed at the instance of the debenture holders constitute a floating security. They constitute a charge and give a license to the company to carry on its business. 2 Ch. 118, 1 Ch. 641."

Moreover, on page 42 of respondents' answer it is asserted that "parole" testimony means both "oral" and "written." Cyclopedia Law Dictionary give the following definitions:

"Parol" (more properly *parole*, a French word, meaning literally "word" or "speech"). "Oral, by word of mouth."

"In contracts. Verbal or merely written, as distinguished from sealed. 1 Chit. Con. 1; 3 Johns. Case (N. Y.) 60."

"In evidence. Parol evidence is that delivered verbally by witnesses in court."

In our original petition for the writ of certiorari, we pointed out specifically wherein the Appeals Court had misconceived and misinterpreted the local or Illinois law applicable. We here take the liberty of quoting briefly from decisions of the Supreme Court of Illinois on the subjects of fiduciary and confidential relations, constructive trusts as well as constructive frauds, and the force and effect to be given to Chancellor's findings and judgments.

In *Dixmoor Golf Club v. Evans*, 325 Ill. 612, a case involving confidential relations by Directors of a corporation with respect to corporate property, p. 615, the court said:

"The decision of this case does not depend upon the doctrine of the rescission of contracts or the fiduciary relation of the promoters of a corporation to the corporation and its stockholders, but it does depend upon the fiduciary relation which the directors of a corporation hold to the corporation and to the stockholders. The law is well settled that a trustee cannot without a breach of the trust deal with its subject matter in such a manner as to make a profit for his own benefit. It requires no very keen moral perception to recognize the obvious justice of this universal rule of law, justice and morality. * * * (Citing authorities) While a director is not disqualified from dealing with the corporation and buying its property or selling property to it, he must act fairly and be free from all fraud or unfair conduct, his transactions will be subjected to the closest scrutiny, and if not conducted with the utmost fairness, to the end that the corporation shall have received full value, they will be set aside. (*Nowak v. National Car Coupler Co.*, 260 Ill. 260.) If he becomes a party to a contract with the corporation, his obligation to candor and fair dealing is increased in the precise degree that his representative character has given him power and control from the confidence reposed in him by the stockholders. (*Beach v. Miller*, 130 Ill. 162.) * * *"

In *Sherwin-Will Co. v. Watson Industries*, 361 Ill. 598, a fraudulent conveyance case, p. 605, the court said:

“Since Watson knew of his fraudulent intent as director and president of Watson Orchards, Inc., he knew it also as director and president of Watson Industries, Inc. (*Simmons v. Roseland Security Vault Co.*, 331 Ill. 563.) The fact that the contract evidencing the secret trust was assigned and the assignment later recorded, or that a record of the transaction was made in the minutes of the directors of Watson Orchards, Inc., and in the written contract between the parties, does not change the fact that the agreement was secret and that there was no notice, constructive or otherwise, to other creditors. (*Schmidt v. Shaver*, 196 Ill. 108.) Where a grantor or assignor sells for the purpose of defeating the claim of his creditors, and the grantee or assignee knowingly assists in effectuating such fraudulent intent, or even has notice thereof, he will be regarded as a participant in the fraud, for the law never allows one man to assist in cheating another. (Bump on Fraudulent Conveyances, (2d ed.) 197, *et seq.*) A deed fraudulent in fact is absolutely void as against creditors and is not permitted to stand for any purpose of reimbursement or indemnity. (*Beidler v. Crane*, 135 Ill. 92.)”

In *Pope v. Dapray*, 176 Ill. 478, on p. 484, discussing a constructive trust, the court said:

“If it be true, as contended, the facts presented show a constructive trust, such may be proved and established by parol. A constructive trust is one that arises where a person clothed with some fiduciary character, by fraud or otherwise gains something for himself. (Perry on Trusts, sec. 27; *Reed v. Reed*, 135 Ill. 482.) It is also further defined as where ‘a

person obtains the legal title to property by virtue of a confidential relation and influence, under such circumstances that he ought not, according to the rule of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interests of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust, by construction, out of such circumstances or relations, and this trust will fasten upon the conscience of the offending party and will convert him into a trustee of the legal title, and order him to hold it, or execute the trust in such manner as to protect the rights of the defrauded party and promote the safety and interests of society.' (Perry on Trusts, sec. 166.) This rule has been by this court quoted with approval in the cases of *Beach v. Dyer*, 93 Ill. 295, and *Allen v. Jackson*, 122 *id.* 567."

In that case, the court held that the entire transaction, and the confidential relations existing between the parties, created a constructive trust in favor of plaintiff, and reversed the Chancellor and the Appellate court who had otherwise decreed.

In *Biggins v. Lambert*, 213 Ill. 625, an alleged fraudulent conveyance case, p. 629, the court said:

"It is further contended by the appellant that the evidence fails to show any guilty intent or knowledge on the part of Elizabeth Biggins, or even any fraud on the part of John Ward, as to this conveyance, each of which is necessary to be shown in order to impeach and set aside the deed in question. In the consideration of this point it is not necessary that we set out the evidence tending to support the findings of the Chancellor as to the existence of fraud. We

have carefully reviewed the evidence presented by the abstract furnished us. It is very conflicting. There is evidence which, if believed by the Chancellor, amply justifies the conclusion reached by him. He saw and heard the witnesses, and had much better opportunity for judging as to the weight that should be attached to the testimony of the various witnesses than we have. Under such circumstances the rule is well settled that this court will not disturb the findings of the Chancellor unless manifestly erroneous. Leaving out of consideration the conflicting statement of the witnesses, many circumstances about which there is no question appear that of themselves are strong badges of fraud. * * *

In *Lawson v. Hunt*, 153 Ill. 232, a transfer of the equity of redemption case, also involving confidential relations, concluding the opinion, p. 239, the court said:

“Upon the hearing of the cause, as we have already stated, appellant and his witnesses were examined in open court by the Chancellor. Appellant and his mother denied, in the most positive terms, all the material facts that had been testified to by appellee and her witnesses. The Chancellor, seeing these two witnesses upon the stand and hearing them testify, had much better opportunity than we have for judgment of their credibility, and it is manifest from the findings and the decree of the court that the Chancellor did not believe that said witnesses swore the truth.”

In that cause the sale was effected and certificate of sale issued in the month of August, 1886, and just a few days of August, 1887, remained of the redemption period when the fraud found by the Court was perpetrated.

We also submit herewith a few quotations from decisions of the United States Supreme Court applicable to contentions of petitioners herein:

In the case of *Moore v. Crawford*, 130 U. S. 122, 32 L. Ed. 878, Mr. Justice Fuller on this subject, and on page 880 (L. E.) of the opinion, said:

“Whenever the legal title to property is obtained through means or under circumstances ‘which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrong doer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right and takes the property relieved from the trust.’ *Pomeroy, Eq. Jur.* § 1053.”

In *Angle, Administratrix, etc. v. Chicago St. P. M. & O. Ry. Co.*, 151 U. S. 1, 38 L. Ed. 55, the court, on page 67 (L. E.), said:

“And when the Omaha Company, by its wrongdoings, secured the full legal title to those lands, equity will hold that the party who has been deprived of payment for his work from the Portage Company, by reason of their having been taken away from it, shall be able to pursue those lands into the hands of the wrongdoer, and hold them for the payment of that claim which, but for the wrongdoings of the Omaha Company, would have been paid by the Portage Company, partially, at least, out of their proceeds. While

no express trust is affirmed as to the lands, yet it is familiar doctrine that a party who acquires title to property wrongfully may be adjudged a trustee *ex maleficio* in respect to that property.

“In Pomeroy’s Eq. Jur. § 155, the author says, citing many cases: ‘If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner.’ And again, in section 1053: ‘In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one’s weakness or necessities or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interests, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto*, are practically without limit.

The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer.'

"These authorities are ample to sustain this suit. The property was in the Portage Company for the purpose of aiding in the construction of this road; work was done by the plaintiff in that direction. Equity recognizes a right that that property should be applied in the payment for that work. The wrongdoing of the defendant, the Omaha Company, has wrested the title to this property from the Portage Company and transferred it to itself. It has become, therefore, a trustee *ex maleficio* in respect to the property."

In *Jackson, et al. v. Ludeling, et al.*, 21 Wall. 616, 22 L. Ed. 492, the court had before it quite a similar transaction involving the fraudulent conduct of a director, and quoting from page 498 (L. E.) the court said:

"Thus directors of the Company, owing duties to its stockholders and creditors, not only combined to obtain the company's property for themselves at a sacrifice, through the formality of a judicial sale, but were active participants in successful efforts to defeat a sale for \$550,000 in order that they might become the purchasers for \$50,000.

"It is impossible to sustain such a transaction. Throughout it was grossly inequitable. That the property was sacrificed by means of an unlawful and widespread combination is abundantly proved, and that the directors who were parties to it, and who became the purchasers, were guilty of an inexcusable violation of confidence reposed in them admits of no doubt.

Ludeling, it is true, was not a director, but he was a leading member of the combination and its chief agent to carry out its plans. He knew its purposes. He knew its illegality. He had negotiated the surrender of Horne, with full knowledge of Horne's breach of trust. He assumed the control of Gordon's executory process and, as we have noticed, when told that Gordon had consented to stay the sale, he declared that Gordon had no power to do it. Indeed, Ludeling appears to have had complete possession of the sheriff. He drew up the sheriff's return, carefully stating in it that all the requirements and formalities of the law had been complied with, in the second offering as they had been in the first, and he was, as the evidence shows, most active in defeating an adjudication to Branner & Co. on their large bid."

We further quote from a well reasoned Circuit Court of Appeals opinion (C.C.A. 8) supported by decisions of this Court, upon the subject of actual, willful fraud, where the wrongdoers may be penalized.

In the case of *United States v. Homestake Mining Co.*, 117 Fed. 481 (C. C. A. 8), the court, beginning on page 485, said:

"Every trespasser breaks the law, and to every trespasser the maxim applies that every man knows the law. Notwithstanding all this, the law, in its wisdom, perceives the marked difference in the heinousness of the offenses of those who recklessly, or with actual intention to rob others of their rights, trespass upon their property, and of those who trespass by mistake, and with no evil purpose, no actual, willful intent to commit a wrong; and it declares that the former class shall pay to their victims the full value

of the lumber or the ore they take at the time they sell or use it, while the latter class shall be relieved from liability upon restitution of the value of the timber in the trees or of the value of the ore in the mine. The maxim that every man knows the law applies to all the members of both classes alike. It neither differentiates the classes nor their members, and it has no more relevancy to the real question which cases of this character present than the proposition that three and three are six. That question is always based on the conceded propositions that the defendant has violated the law and that every man knows the law. The question, then, is, did the trespasser violate the law, which he constructively knew, recklessly, or with an actual intent to do so, and to take an unconscientious advantage of his victim, or did he violate it inadvertently, unintentionally, or in the honest belief that he was exercising his own right? If the former, he was a willful trespasser, and the value of the manufactured timber or the extracted ore measures his liability. If the latter, he was an innocent trespasser, and the value of the wood in the tree or of the ore in the mine is the limit of his indebtedness. The test to determine whether one was a willful or an innocent trespasser is not his violation of the law in the light of the maxim that every man knows the law, but his honest belief, and his actual intention at the time he committed the trespass; and neither a justification of the acts nor any other complete defense to them is essential to the proof that he who committed them was not a willful trespasser."

Other cases supporting this rule are :

Bolles Wooden Ware Company v. United States,
106 U. S. 432, 433; 27 L. Ed. 230.

Resurrection G. M. Co. v. Fortune G. M. Co., 64
C. C. A. 180, 192; 129 Fed. 668, 679.

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204 Fed. 166, 178.

Illinois and St. Louis R. R. & C. Company v. Ogle,
82 Ill. 627.

Ege v. Kille, 84 Penn. St. 333.

Durant M. Co. v. Percy M. Co., 93 Fed. 166.

Patchen v. Keeley, 19 Nev. 404, 14 Pac. 347, 353.

Lightner M. Co. v. Lane, 161 Cal. 689; 120 Pac. 771,
777.

In conclusion it is respectfully urged that petitioners' petition for the writ of certiorari herein be granted, thereby permitting petitioners to fully demonstrate and prove to this High and final Tribunal that the inferior appeals court herein committed error in reversing the judgment of the trial court, to the end that truth may prevail.

Respectfully submitted,

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